

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT****Office of the Assistant Secretary for Housing—Federal Housing Commissioner****24 CFR Parts 813 and 885****[Docket No. R-94-1364; FR-1761-F-02]****RIN: 2502-AC03****Management Rules for Existing Projects for the Elderly****AGENCY:** Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.**ACTION:** Final rule.

**SUMMARY:** This final rule amends the provisions of 24 CFR part 885 which govern projects that received direct loans under section 202 of the Housing Act of 1959 and housing assistance under section 8 of the United States Housing Act of 1937. The rule adds regulatory provisions to govern the housing assistance payments contract, project operations and project management.

**EFFECTIVE DATE:** February 9, 1995.**FOR FURTHER INFORMATION CONTACT:**

With respect to Section 202 issues contact: Margaret Milner, Acting Director, Office of Elderly and Assisted Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6130, Washington, DC 20410; telephone (202) 708-4542. With respect to Section 8 issues contact: Barbara Hunter, Acting Director, Planning and Procedures Division, Office of Multifamily Housing Management, Room 6182, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410; telephone (202) 426-3970. Hearing or speech impaired individuals may call HUD's TDD number (202) 708-4594. (These are not toll-free numbers.)

**SUPPLEMENTARY INFORMATION:****I. Paperwork Burden**

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520), and assigned OMB control number 2502-0371.

**II. Background**

HUD's regulations at 24 CFR part 885, subpart B govern projects that received direct loans under section 202 of the Housing Act of 1959 and housing assistance payments under section 8 of the United States Housing Act of 1937

(section 202/8 program). This subpart contains provisions governing the development of section 202/8 projects including the loan fund allocation process, application procedures, and loan financing procedures. There are no regulatory provisions governing the housing assistance payments contract (HAP contract) (except § 885.425 on HAP contract execution) or governing the management and operation of section 202/8 projects (except for preference rules published on July 18, 1994 at 59 FR 36616). On December 9, 1987 (52 FR 46614), HUD published a proposed rule adding such provisions. In response to the proposed rule, HUD received six comments. The comments and HUD's responses are discussed below.

On June 20, 1989 (54 FR 25960), HUD published a final rule adding a new subpart C to part 885. That subpart, which implemented amendments to the section 202 program contained in section 162 of the Housing and Community Development Act of 1987, governs section 202 housing for nonelderly handicapped families and individuals. Such housing does not receive assistance under section 8, but receives a new type of project assistance. On June 12, 1991, HUD published two interim rules (56 FR 27104, 56 FR 27070) providing for the continued applicability of part 885 to projects for which section 202 loan reservations were made in FY 1990 and prior years. These interim rules also added new parts 889 and 890 to establish the Supportive Housing for the Elderly Program and Supportive Housing for Persons with Disabilities Program and to enable FY 1991 funding of projects under those programs. Requirements relating to capital advances and project rental assistance contracts (these new projects do not receive section 8 rental assistance) were published August 12, 1992 at 57 FR 36338 and 57 FR 36330, and management rules for these new programs will be published shortly.

**Public Comments**

**Part 813.** A commenter requested that HUD provide further information regarding the relationship between part 813 and part 885. The commenter also requested clarification concerning which part will govern if there are inconsistencies between the parts.

Section 813.1, which was not proposed for amendment in the proposed rule, currently provides the definitions, policies, and procedures related to income limits, and the determination of eligibility, income and rent for applicants and tenants in

housing assisted under section 8 *including section 8 projects for which loans are made under section 202 of the Housing Act of 1959*. HUD is unaware of any inconsistencies between part 813 and part 885, other than differences between the definitions of elderly and handicapped families. These differences reflect statutory definitions applicable to the section 8 and section 202 programs (see the definition of "families" and "elderly family" in section 3(b)(3) of the United States Housing Act of 1937, and the definition of "elderly or handicapped families" in section 202(d)(4)). To the extent of these or any other inconsistencies, the part that more specifically addresses the program (i.e., part 885) will govern. References have been added for part 889 (Supportive Housing for the Elderly) and part 890 (Supportive Housing for Persons with Disabilities).

**Definitions (§ 885.5).** A new definition of handicapped person or individual was added to part 885 in the final rule published June 20, 1989 implementing section 162 of the Housing and Community Development Act of 1987. In that rule, HUD proposed the same definition of handicapped person or individual that was contained in the proposed rule for the section 202/8 program. (Both proposed rules included a revised definition of handicapped person or individual that contained specific definitions of developmentally disabled and chronically mentally ill. Alcoholism and drug addiction were specifically excluded from the definition of chronically mentally ill unless the individual has a disabling condition required for eligibility.)

Commenters to both proposed rules made substantially the same comments on the proposed definition. Some commenters argued that the exclusion of alcoholism and drug addiction was contrary to section 504 of the Rehabilitation Act of 1973 which specifically extends coverage to alcoholics and drug addicts. Other commenters supported the exclusion of such persons.

In the June 20, 1989 final rule, HUD responded to these objections and substituted new language that provided that a person whose sole impairment is alcoholism or drug addiction (i.e., who does not have a developmental disability, chronic mental illness or physical disability which is the disabling condition required for eligibility in a particular project) will not be considered to be handicapped for the purposes of the section 202 program. The discussion of these changes can be found at that rule at 54 FR 25962, and is adopted without change for the

purposes of this rule. Because the definitions section of part 885 governs both the section 202 handicapped housing program and the section 202/8 program, the text of the final rule adopted today does not include a definition.

*Term of HAP contract (§ 885.505).*

The proposed rule at § 885.505 provided that the term of the HAP contract for assisted units in section 202/8 projects is 20 years. If the project is completed in stages, the term of the HAP contract for all assisted units in all stages of a project may not exceed 22 years. One commenter recommended that HUD should provide short extensions of the HAP contract if the facility or the tenants would suffer an undue hardship without the extension. Section 885.535 already provides that HUD and the Borrower may agree to extend the term of the HAP contract or to renew the HAP contract upon the expiration of the term of the contract. This section has been clarified to state that any extension or renewal is subject to the availability of funding.

*Fair Market rents.* One commenter recommended that the Department develop additional language in part 885 specifying how fair market rents (FMRs) will be calculated for section 202/8 facilities. This commenter claimed that the Department's method of calculating FMRs was not economically feasible for many section 202 facilities. Under the section 202/8 program, the applicable published FMRs were used in development processing to determine the amount reserved for the section 8 funding and served as a limit on the amount of the section 202 loan that could be made. They served as the initial contract rents (although they could be adjusted based on the amount of the loan). Thereafter, the contract rents are adjusted based on the project's approved budget or by the annual (and special) adjustment factor as specified in the contract. HUD believes that the regulations are sufficiently specific. No additional provisions have been included in this rule, particularly since no new reservations are subject to section 8 FMRs.

*Leasing to eligible families*

(§ 885.515). Proposed § 885.515 implemented section 325(1) of the Housing and Community Development Act of 1981 which requires that HAP contracts for new construction and substantial rehabilitation must provide that during the term of the HAP contract, the owner shall make available for occupancy by eligible families the number of units for which assistance is committed under the HAP contract. Under the proposed rule making units

available for occupancy by eligible families required the Borrower: (1) to conduct marketing in accordance with § 885.600(a) (i.e., the Borrower must commence and continue diligent marketing activities not later than 90 days before the anticipated date of availability for occupancy of the first unit and marketing must be performed in accordance with a HUD-approved affirmative marketing plan and all fair housing and equal opportunity requirements); (2) lease or make good faith efforts to lease the units to eligible and otherwise acceptable families, including taking all feasible actions to fill vacancies by renting to such families; and (3) not reject any such applicant family except for reasons acceptable to HUD. The proposed rule stated that if the Borrower is temporarily unable to lease all assisted units to families that are eligible to occupy them, one or more units may, with the prior approval of HUD, be leased to "ineligible families" (i.e., families that meet the section 202 handicapped or elderly eligibility requirements, but cannot meet the income eligibility requirements).

A commenter argued that the proposed rules do not adequately ensure that effective outreach techniques will be used. The commenter argued that once the Borrower complies with HUD's general fair housing and equal opportunity requirements and continues this outreach strategy for 90 days, its marketing obligations would be fulfilled and the Borrower would be free to rent to ineligible tenants. The commenter argued that the final rule should require Borrowers to specifically target the elderly and handicapped populations in their outreach strategies. Further, the commenter suggested that HUD provide for the use of a centralized computer system for matching Borrowers and tenant applicants.

HUD believes that the regulations are adequate to ensure that the Borrower will market to eligible handicapped and elderly families. HUD notes that, in addition to the marketing requirements cited by the commenter, making units available to eligible families requires the Borrower to demonstrate that it has leased or *is making good faith efforts* to lease units to eligible and otherwise acceptable families. Without such a showing, HUD will not approve a Borrower's request for permission to lease to ineligible families. Moreover, the Affirmative Fair Housing Marketing Plan is in effect for the duration of the Federal financial assistance. While affirmative marketing efforts must commence at least 90 days prior to the initial rent-up, they also must continue

throughout the life of the Federal financial assistance. In light of the expense involved in the establishment of a centralized computer system and questions concerning the necessity of a system, HUD has rejected the commenter suggestion regarding the provision of a computerized system for matching Borrowers and tenant-applicants.

One commenter argued that the provision permitting the Borrower to lease to ineligible families is unnecessary since sufficient numbers of income-eligible families can be located if Borrowers make an effort. The commenter feared that this exception would lead to other practices or exceptions that would undermine efforts to serve the poor and the homeless.

The proposed provision has been retained in the final rule. The failure to achieve necessary occupancy could impair project operations to the detriment of tenants and would ultimately create a danger of a default on the section 202 loan. Such a default and foreclosure could result in the project being entirely disassociated from its original purpose, if purchased by an outside bidder. Accordingly, HUD has concluded that the proposed provision may be essential in order to preserve certain projects for the benefit of present and future eligible tenants. HUD believes that the requirement for prior approval will ensure adequate supervision of the project and will prevent the abuses predicted by the commenter.

A commenter suggested that the final rule should be revised to permit Borrowers, without prior HUD authorization, to rent up to five percent of the units to low-income families where very low-income families are not available to fill a vacancy. Section 16 of the United States Housing Act of 1937 establishes limitations on the admission to the Section 8 and public housing programs of low-income families, but not very low income. HUD has implemented this national limitation by prohibiting the admission of families in this category, unless the owner has received prior HUD approval (see §§ 813.105 and 913.105). Section 103 of the Housing and Community Development Act of 1987 and section 1001 of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988 amended the United States Housing Act of 1937 to state that HUD may not totally prohibit admission of lower income families other than very low-income families, shall establish an appropriate specific percentage of lower income families other than very low-

income families that may be assisted in each assisted housing program, and shall prohibit project owners from selecting families for residence in an order different from the order on the waiting list for the purpose of selecting relatively higher income families for residence. A final rule implementing the 1987 amendment was published on September 6, 1988 (53 FR 34412).

Section 16(b) of the United States Housing Act of 1937 was amended by the Cranston-Gonzalez National Affordable Housing Act (CGNAHA) by striking 5% and inserting 15% and adding the following new paragraph: "Not more than 25 percent of the dwelling units in any project of any agency shall be available for occupancy by low-income families other than very low-income families. The limitation shall not apply in the case of any project in which, before the enactment of the CGNAHA, such low-income families occupy more than 25 percent of the dwelling units." The Department is pursuing rulemaking to implement these changes.

*Notice upon HAP contract expiration (§ 885.530).* Proposed § 885.530 implements section 8(c)(8) of the United States Housing Act of 1937 which governs the Borrower's notification of tenants upon the expiration of the HAP contract. A commenter recommended that the final rule also include a requirement that HUD notify the Borrower one year before the expiration of the contract term. Section 262 of the Housing and Community Development Act of 1987 added a new section 8(c)(9) to the United States Housing Act of 1937. This new provision imposed a requirement on the owner to give one year's notice prior to the termination. This new provision was self-implementing and HUD issued instructions on this provision to all Section 8 owners (including section 202/8 owners) in a memorandum dated July 6, 1988.

*Responsibilities of Borrower (§ 885.600).* Paragraph (d)(1) of § 885.600 (responsibilities of Borrower) provided that financial statements must be provided to HUD 60 days after the end of each fiscal year of operations. A commenter suggested that Borrowers be given an option in the HAP contract (with provisions for adjustment) to determine the dates to be used for the fiscal year. The HAP contract permits fiscal years ending on March 31, June 30, September 30, or December 31.

While Borrowers may request a fiscal year ending on any of these dates, such requests are subject to approval by HUD.

Under § 885.600(d)(2), the Borrower must provide such other statements

regarding project operation, financial condition, and occupancy as HUD may require to administer the HAP contract and to monitor project operations. A commenter requested HUD to explain or provide examples of such "other statements". Other statements will include: monthly accounting statements; tenant assistance payments requests and special claims requests (claims for unpaid rent, tenant damages and other charges and claims for vacancy loss); and quarterly and annual occupancy reports.

Proposed paragraph (e) required the maintenance of a project fund account. All funds remaining in the project fund account following the expiration of the project's fiscal year (i.e., the excess of project income over project operating expenses, required principal and interest payment and deposits to the replacement reserve) were required to be deposited in the replacement reserve account following the expiration of the fiscal year. The final rule has been revised to conform to the practices currently applied in the section 8 program. These practices provide that the remaining funds are deposited in a residual receipts account. Amounts in this account may be used to reduce housing assistance payments and for other project purposes with the approval of HUD. Upon termination of the contract any excess funds must be remitted to HUD.

*Replacement reserve (§ 885.605).* One commenter thought that proposed § 885.605, which governs the amount of the replacement reserve, required a contribution of .6 percent for the first year and .4 percent for the second year of operations. After the first two years, the commenter recommended the use of a sliding scale (based on the age of the building) to maintain an adequate reserve.

This commenter has misread the proposed rule. The proposed rule provided that the annual amount of the deposit is .6 percent of the cost of the total structure (for new construction projects) or .4 percent of the cost of the initial mortgage (for all other projects). This amount would have been required for deposit and adjusted yearly by the amount of the annual adjustment factor and may be reduced if HUD determines that the reserve has reached a level sufficient to meet project requirements (see § 885.605(b) and (c)). To provide flexibility, HUD has decided not to specify a percentage of cost amount in the final rule, instead HUD will determine the amount whenever appropriate.

Another commenter suggested that HUD permit Borrowers to use the

replacement reserve for preventive and maintenance efforts, and for physical adjustments necessary to accommodate the needs of residents aging in place. The proposed change has not been made. The purpose of the replacement reserve is to ensure that sufficient funds will be available to provide for extraordinary maintenance, and repair and replacement of capital items (e.g., replacement of structural elements and mechanical equipment in the project.) Operating expenses such as day-to-day maintenance requirements and preventive maintenance expenses are to be paid from operating revenues. Currently, Borrowers may request HUD to approve the use of the replacement reserve for payments for some items to accommodate aging residents. If such requests are approved, however, HUD requires the Borrower to replenish the reserve.

*Selection and admission of tenants (§ 885.610).* Proposed § 885.610 stated that the Borrower is responsible for deciding whether an applicant is eligible for admission to the project. Applicants for admission must meet the eligibility requirements applicable to them under the section 202/8 program concerning age or handicap, and income. The preamble noted that in addition to these admission requirements, Borrowers would be permitted to develop and implement additional tenant selection criteria.

A commenter representing a disability group argued that the rule would give Borrowers too much discretion in the selection of tenants and would require Borrowers to make determinations beyond their areas of expertise. The commenter objected to the example cited in the preamble that stated that a Borrower could refuse to admit an otherwise eligible applicant, if the applicant is unable to live independently in the project without support services that he or she needs, but which are not available. The commenter predicted that such Borrower determinations could be arbitrary and constitute discrimination against the handicapped. The commenter suggested that these determinations should be left to the tenant-applicant.

Section 8 allows owners the discretion to establish which of the eligible applicants they want to admit as tenants. This allows an owner to establish "suitability" requirements, such as that tenants be able to live independently, and, concomitantly, to make decisions on whether a particular applicant meets those criteria. HUD, through this regulation, is creating a procedure to appeal an owner's initial

admission determination, if an applicant thinks it is wrong. Therefore, an applicant will have an opportunity to correct an owner's suitability decision to the extent it leads to an unlawful admission determination (such as one in violation of the civil rights laws, including section 504).

While the owner of section 202 "elderly" project may only consider applicants "suitable" if they can live independently—an applicant for a section 202 "handicapped" project must "have an impairment which \* \* \* substantially impedes his ability to live independently" and that "could be improved by more suitable housing conditions." See section 202(d)(4).

The example in the preamble to the section 202 rule regarding ability to live independently reflected the proposed rule implementing section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). The proposed section 504 rule defined qualified handicapped person, in part, with regard to the person's capacity for independent living. In the final section 504 rule published June 2, 1988 (53 FR 20216), HUD dropped references to the ability to live independently from the definition of qualified individual with handicaps. Instead, the definition was revised to focus on the handicapped individual's capacity to comply with all obligations of occupancy whether without supportive services or with supportive services provided by persons other than the recipient. Thus, Borrowers must make a determination whether an applicant can fulfill all obligations of occupancy. In a project that does not provide supportive services, it is irrelevant whether the obligations of tenancy are met by the individual alone or with assistance that the individual with handicaps arranges. Further, in making eligibility determinations, a presumption in favor of the individual's own assessment of his or her capabilities is warranted in absence of evidence to the contrary.

Under the proposed rule, a tenant-applicant may request a review of the Borrower's determination of ineligibility. The review would be made by a member of the Borrower's staff who did not make the initial decision to reject. A commenter noted that many projects would be unable to comply with this requirement because their staffs are too small. As an alternative, the commenter suggested that HUD permit such Borrowers to convene a panel to review determinations.

The final rule has been revised to permit the Borrower (with prior HUD approval) to appoint a panel of individuals to review eligibility

determinations, if the size of the Borrower's staff will not permit a review by a member of the staff that did not make the original decision. Under these circumstances, HUD will approve the panel if the Borrower demonstrates that the members of the panel are qualified to make eligibility determinations (e.g., members of the staff of a comparable section 8 project in the area).

Based on the broad discretion provided to Borrowers in the development and implementation of tenant selection procedures, one commenter suggested that HUD should provide a review of Borrower's selections through the provision of administrative hearings to applicants that are rejected for tenancy. HUD is mindful of its duty to assure that the policies implemented by Borrowers are enforced in a non-arbitrary and non-discriminatory manner. However, rather than establishing a burdensome administrative review process, HUD believes that its role should be limited to the provision of tenant selection guidance by regulations and through other issuances, and to the review of the Borrower's tenant selection plan and procedures during the management review of the project. HUD has limited authority in this area, i.e., to reject an owner's criteria for selecting among statutorily eligible applicants *only* when the criteria the owner uses to determine whether applicants would be suitable tenants would violate the civil rights laws, such as section 504 of the Rehabilitation Act.

(In addition to the regulatory guidance found in the final rule, HUD notes that Occupancy Requirements of Subsidized Multifamily Housing Programs (HUD handbook-4350.3 Chg-1, ¶ 2-15, ¶ 2-16 and ¶ 2-17) require Borrowers to develop a written tenant selection plan covering such matters as procedures for accepting applications and screening tenants, fair housing and equal opportunity requirements, preferences and priorities required by HUD or established by the Borrower, etc., and provide additional administrative guidance on permitted and prohibited screening criteria.)

**Federal selection preferences.** A final rule revising tenant selection preferences including preferences requirements for this program was published on July 18, 1994 at 59 FR 36616. Section 885.427 was revised to incorporate the preference provisions of §§ 880.613-880.617.

**Overcrowded and underoccupied units (§ 885.620).** Proposed § 885.620 governs unit transfers where the Borrower has determined that an

assisted unit is overcrowded or underoccupied. A commenter was concerned that the proposed regulations would permit a Borrower to force a tenant to change apartments in order to comply with the unit size requirements. The commenter argued that this requirement may conflict with State and local laws that prohibit a landlord from moving an unwilling tenant. The commenter recommended that the final rule permit flexibility in complying with HUD requirements.

The Department is charged with the responsibility for assuring that housing assistance payments are used efficiently, including the appropriate assignment and reassignment of families to units of a proper size. Accordingly, the final rule provides that the Borrower will, as promptly as possible, offer the family an appropriate alternate unit. Contrary to the commenter's fears, the rule would not permit the Borrower to force an unwilling tenant to move. The existing HUD procedures permit the tenant to remain in the unit and pay the market rent, or move within 30 days of the notification that a unit of the required size is available within the project.

**Lease requirements (§ 885.625).** Under § 885.625, the lease must contain all required provisions and none of the prohibited provisions specified by HUD. One commenter argued that HUD should prepare a new model lease for section 202/8 projects. This commenter attached a copy of a proposed lease and encouraged HUD to adopt it in the Section 202 handbook. HUD has prepared a new model lease and it is available from HUD Field Offices and is contained in the 4350.3 Handbook Chg. 22, Appendix 19C, dated June 1992.

**Security Deposits (§ 885.635).** Under proposed § 885.635, the Borrower must require each family occupying an assisted unit to pay a security deposit in an amount equal to one month's total tenant payment or \$50, whichever is greater. A commenter argued that the minimum security deposit should be increased to \$100. The commenter argued that this amount represents a reasonable minimum tenant contribution, would safeguard the Borrower, and would reduce the cost of unpaid charge claims and tenant damage reimbursement requests.

The \$50 limit is the minimum deposit that is currently required under the section 202/8 and related section 8 programs. It balances the ability of the targeted tenant population (i.e., low and very low income persons) to pay a security deposit with the Borrower's need for an adequate resource to offset damages caused to the unit. (HUD notes that the family's security deposit

balance is not the only resource available to a Borrower to recover sums owed. Under the final rule (§ 885.635(c)), if the family's security deposit is insufficient to reimburse the Borrower for any unpaid rent, or other amount which the family owes under the lease for an assisted unit, the Borrower may claim reimbursement from HUD in an amount not to exceed the lesser of the amount owed to the Borrower or one month's contract rent, minus the amount of the family's security deposit.) The \$50 minimum has been retained in the final rule.

**Adjustment of Rents (§ 885.640).** Section 885.640 governs the adjustment of contract rents. Adjustments are made by one of two methods. Generally, HAP contracts that were entered into prior to 1981 provide for adjustments using an automatic annual adjustment factor and special additional adjustments. Contracts executed or amended after 1981 provided for adjustment based on a HUD-approved budget.

One commenter encouraged HUD to allow, within the rent adjustment, an annual adjustment for utility costs based on the projected costs established by utility companies, rather than the past years' actual expenditures. Contrary to the commenter's assumption, rent adjustments based on the HUD-approved budget may not necessarily be performed as frequently as annually. However, when such adjustments are performed HUD does consider the actual utility rates that are in effect and approved utility rate increases that will be implemented during the year. HUD does not believe it is necessary to revise the rule to accommodate the commenter's suggestion.

Where the HAP contract provides that rent adjustments will be based on the application of an annual adjustment factor the procedures are different. The Department considers the average annual cost of utilities for the prior year in determining the section 8 annual adjustment factor. If the annual adjustment factor is insufficient to cover the cost of an approved increase, the Borrower may request HUD to approve a special adjustment under § 885.640(a)(2)(ii).

#### *Other Matters*

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection during regular business hours in the Office of the General

Counsel, Rules Docket Clerk, Room 10276, 451 Seventh Street, S.W., Washington, D.C. 20410-0500.

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned certifies that this rule does not have a significant economic impact on a substantial number of small entities. The contract and management provisions incorporated in this rulemaking generally reflect existing HUD policies already guiding operators of section 202/8 projects. This proceeding does not change the goals toward which program activities are directed. The rule's effect both on small and large entities should be minor.

The General Counsel, as the Designated Official under section 6(a) of Executive Order No. 12611—Federalism, has determined that the final rule does not involve the preemption of State law by Federal statute or regulation and does not have Federalism implications. The rule reflects existing HUD policies guiding non-profit organizations operating section 202/8 projects. The rule, to the maximum extent possible, defers to State and local policies (see e.g., §§ 885.635(b)(1), (3) and (5)).

This rule was listed as sequence number 1805 in the Department's Semiannual Agenda of Regulations published November 14, 1994 (59 FR 57632, 57657) under Executive Order 12866 and the Regulatory Flexibility Act.

#### **List of Subjects**

##### *24 CFR Part 813*

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements, Utilities.

##### *24 CFR Part 885*

Aged, Individuals with disabilities, Loan programs—housing and community development, Low and moderate income housing, Reporting and recordkeeping requirements.

Accordingly, in title 24 of the Code of Federal Regulations, parts 813 and 885, are amended as follows:

#### **PART 813—DEFINITION OF INCOME, INCOME LIMITS, RENT AND REEXAMINATION OF FAMILY INCOME FOR THE SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAMS AND RELATED PROGRAMS**

1. The authority citation for 24 CFR part 813 continues to read as follows:

**Authority:** 42 U.S.C. 1437a, 1437c, 1437f, 1437n and 3535(d).

2. In § 813.109, the section heading and paragraph (a), is revised to read as follows:

#### **§ 813.109 Initial determination, verification, and reexamination of Family income and composition.**

(a) *Responsibility for initial determination and reexamination.* The Owner or PHA shall be responsible for determination of eligibility for admission, for determination of Annual Income, Adjusted Income and Total Tenant Payment, and for reexamination of Family income and composition at least annually, as provided in pertinent program regulations and handbooks (see, e.g., 24 CFR part 880, subpart F; 24 CFR part 881, subpart F; 24 CFR part 882, subparts B and E; 24 CFR part 883, subpart G; 24 CFR part 884, subpart B; 24 CFR part 885, subparts B and C; 24 CFR part 886, subparts A and C; 24 CFR part 887, subpart H; and 24 CFR parts 889 and 890.). As used in this part, the "effective date" of an examination or reexamination refers to:

(1) In the case of an examination for admission, the effective date of initial occupancy; and

(2) In the case of a reexamination of an existing tenant, the effective date of the redetermined housing assistance payment with respect to the Housing Voucher program (part 887 of this chapter) and the effective date of the redetermined Total Tenant Payment in all other cases.

\* \* \* \* \*

#### **PART 885—LOANS FOR HOUSING FOR THE ELDERLY OR HANDICAPPED**

3. The authority citation for 24 CFR part 885 continues to read as follows:

**Authority:** 12 U.S.C. 1701q; 42 U.S.C. 1437f and 3535(d).

4. In § 885.5, the definition of "Section 8 Program", is revised to read as follows:

#### **§ 885.5 Definitions.**

\* \* \* \* \*

*Section 8 Program* means the housing assistance payments program which implements section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f note).

\* \* \* \* \*

5. In subpart B, § 885.200 is redesignated as § 885.203, and a new § 885.200 is added, to read as follows:

#### **§ 885.200 Definitions applicable to Subpart B.**

As used in this subpart B:  
*Agreement to enter into housing assistance payments contract* means the agreement between the Borrower and

HUD which provides that, upon satisfactory completion of the project in accordance with the HUD-approved final proposal, HUD will enter into the HAP contract with the Borrower.

*Annual income* is defined in part 813 of this chapter.

*Assisted unit* means a dwelling unit eligible for assistance under a HAP contract.

*Contract rent* means the total amount of rent specified in the HAP contract as payable by HUD and the tenant to the Borrower for an assisted unit.

*Family (eligible family)* means an elderly or handicapped family (as defined in this section) that meets the project occupancy requirements approved by HUD and, if the family occupies an assisted unit, meets the requirements described in part 813 of this chapter.

*Gross rent* is defined in part 813 of this chapter.

*HAP contract* (housing assistance payments contract) means the contract entered into by the Borrower and HUD setting forth the rights and duties of the parties with respect to the project and the payments under the HAP contract.

*Housing assistance payment* means the payment made by HUD to the Borrower for assisted units as provided in the HAP contract. The payment is the difference between the contract rent and the tenant rent. An additional payment is made to a family occupying an assisted unit when the utility allowance is greater than the total tenant payment. A housing assistance payment, known as a "vacancy payment", may be made to the Borrower when an assisted unit is vacant, in accordance with the terms of the HAP contract.

*Project account* means a specifically identified and segregated account for each project which is established in accordance with § 885.510(b) out of the amounts by which the maximum annual commitment exceeds the amount actually paid out under the HAP contract each year.

*Project occupancy requirements* means eligible populations to be served under the Section 202 program are qualified individuals or families whose head of household or spouse is elderly, physically handicapped, developmentally disabled or chronically mentally ill. Projects are designed to meet the special needs of the particular tenant population which the Borrower was selected to serve. Individuals from one eligible group may not be accepted for occupancy in a project designed for a different tenant group. However, a Sponsor can propose to house eligible tenant groups other than the one it was selected to serve, but must apply to the

HUD Field Office for permission to do so, based on a plan which demonstrates that it can adequately serve the proposed tenant group. Upon review and recommendation by the Field Office, HUD Headquarters will approve or disapprove the request.

*Rent*, in the case of a unit in a cooperative project, means the carrying charges payable to the cooperative with respect to occupancy of the unit.

*Tenant rent* means the monthly amount defined in, and determined in accordance with part 813 of this chapter.

*Total tenant payment* means the monthly amount defined in, and determined in accordance with part 813 of this chapter.

*Utility allowance* is defined in part 813 of this chapter and is determined or approved by HUD.

*Utility reimbursement* is defined in part 813 of this chapter.

*Vacancy payment* means the housing assistance payment made to the Borrower by HUD for a vacant assisted unit if certain conditions are fulfilled, as provided in the HAP contract. The amount of the vacancy payment varies with the length of the vacancy period and is less after the first 60 days of any vacancy.

6. In § 885.210, paragraph (b)(5) is revised, to read as follows:

**§ 885.210 Contents of applications.**

\* \* \* \* \*

(b) \* \* \*

(5) A narrative description of the anticipated occupancy of the project. The Borrower must propose project occupancy requirements that limit occupancy to the elderly and/or handicapped.

\* \* \* \* \*

7. In § 885.425, the section heading is revised; paragraph (b) is removed; paragraphs (c), (d), (e) and (f) are redesignated as paragraphs (b), (c), (d) and (e), respectively; to read as follows:

**§ 885.425 Completion of project, cost certification and HUD approvals.**

\* \* \* \* \*

8. Sections 885.500 through 885.655 are added to subpart B, to read as follows:

**§ 885.500 HAP contract.**

(a) *HAP contract.* The housing assistance payments contract sets forth rights and duties of the Borrower and HUD with respect to the project and the housing assistance payments.

(b) *HAP contract execution.* (1) Upon satisfactory completion of the project, the Borrower and HUD shall execute the HAP contract on the form prescribed by HUD.

(2) The effective date of the HAP contract may be earlier than the date of execution, but no earlier than the date of HUD's issuance of the permission to occupy.

(3) If the project is completed in stages, the procedures of paragraph (b) of this section shall apply to each stage.

(c) *Housing assistance payments to owners under the HAP contract.* The housing assistance payments made under the HAP contract are:

(1) Payments to the Borrower to assist eligible families leasing assisted units. The amount of the housing assistance payment made to the Borrower for an assisted unit leased to an eligible family is equal to the difference between the contract rent for the unit and the tenant rent payable by the family.

(2) Payments to the Borrower for vacant assisted units ("vacancy payments"). The amount of and conditions for vacancy payments are described in § 885.650. The housing assistance payments are made monthly by HUD upon proper requisition by the Borrower, except payments for vacancies of more than 60 days, which are made semiannually by HUD upon requisition by the Borrower.

(d) *Payment of utility reimbursement.* Where applicable, a utility reimbursement will be paid to a family occupying an assisted unit as an additional housing assistance payment. The HAP contract will provide that the Borrower will make this payment on behalf of HUD. Funds will be paid to the Borrower in trust solely for the purpose of making the additional payment. The Borrower may pay the utility reimbursement jointly to the family and the utility company, or, if the family and utility company consent, directly to the utility company.

**§ 885.505 Term of HAP contract.**

The term of the HAP contract for assisted units shall be 20 years. If the project is completed in stages, the term of the HAP contract for assisted units in each stage shall be 20 years. The term of the HAP contract for all assisted units in all stages of a project shall not exceed 22 years.

**§ 885.510 Maximum annual commitment and project account.**

(a) *Maximum annual commitment.* The maximum annual amount that may be committed under the HAP contract is the total of the contract rents and utility allowances for all assisted units in the project.

(b) *Project account.* (1) HUD will establish and maintain a specifically identified and segregated project account for each project. The project

account will be established out of the amounts by which the maximum annual commitment exceeds the amount actually paid out under the HAP contract each year. HUD will make payments from this account for housing assistance payments as needed to cover increases in contract rents or decreases in tenant income and other payments for costs specifically approved by the Secretary.

(2) If the HUD-approved estimate of required annual payments under the HAP contract for a fiscal year exceeds the maximum annual commitment for that fiscal year plus the current balance in the project account, HUD will, within a reasonable time, take such steps authorized by section 8(c)(6) of the United States Housing Act of 1937 (42 U.S.C. 1437f note), as may be necessary, to assure that payments under the HAP contract will be adequate to cover increases in contract rents and decreases in tenant income.

#### **§ 885.515 Leasing to eligible families.**

(a) *Availability of assisted units for occupancy by eligible families.* (1) During the term of the HAP contract, a Borrower shall make available for occupancy by eligible families the total number of units for which assistance is committed under the HAP contract. For purposes of this section, making units available for occupancy by eligible families means that the Borrower:

- (i) Is conducting marketing in accordance with § 885.600(a);
- (ii) Has leased or is making good faith efforts to lease the units to eligible and otherwise acceptable families, including taking all feasible actions to fill vacancies by renting to such families;
- (iii) Has not rejected any such applicant family except for reasons acceptable to HUD.

(2) If the Borrower is temporarily unable to lease all units for which assistance is committed under the HAP contract to eligible families, one or more units may, with the prior approval of HUD, be leased to otherwise eligible families that do not meet the income eligibility requirements of part 813. Failure on the part of the Borrower to comply with these requirements is a violation of the HAP contract and grounds for all available legal remedies, including an action for specific performance of the HAP contract, suspension or debarment from HUD programs, and reduction of the number of units under the HAP contract as set forth in paragraph (b) of this section.

(b) *Reduction of number of units covered by the HAP contract.* HUD may reduce the number of units covered by the HAP contract to the number of units

available for occupancy by eligible families if:

(1) The Borrower fails to comply with the requirements of paragraph (a) of this section; or

(2) Notwithstanding any prior approval by HUD, HUD determines that the inability to lease units to eligible families is not a temporary problem.

(c) *Restoration.* HUD will agree to an amendment of the HAP contract to provide for subsequent restoration of any reduction made under paragraph (b) of this section if:

(1) HUD determines that the restoration is justified by demand;

(2) The Borrower otherwise has a record of compliance with the Borrower's obligations under the HAP contract; and

(3) Contract and budget authority is available.

(d) *Applicability.* In accordance with section 555 of the Cranston-Gonzalez National Affordable Housing Act of 1990, paragraphs (a) and (b) of this section apply to all contracts. An owner who had leased an assisted unit to an ineligible family consistent with the regulations in effect at the time will continue to lease the unit to that family. However, the owner must make the unit available for occupancy by an eligible family when the ineligible family vacates the unit.

(e) *Occupancy by families that are not elderly or handicapped.* HUD may permit units in the project to be leased to other than elderly or handicapped families if:

(1) The Borrower has made reasonable efforts to lease assisted and unassisted units to eligible families;

(2) The Borrower has been granted HUD approval under paragraph (a) of this section; and

(3) The Borrower is temporarily unable to achieve or maintain a level of occupancy sufficient to prevent financial default and foreclosure under the section 202 loan documents. HUD approval under paragraph (e)(3) of this section will be of limited duration. HUD may impose terms and conditions to this approval that are consistent with program objectives and necessary to protect its interest in the section 202 loan.

#### **§ 885.520 HAP contract administration.**

HUD is responsible for the administration of the HAP Contract.

#### **§ 885.525 Default by Borrower.**

(a) *HAP contract provisions.* The HAP contract will provide:

(1) That if HUD determines that the Borrower is in default under the HAP contract, HUD will notify the Borrower

of the actions required to be taken to cure the default and of the remedies to be applied by HUD including an action for specific performance under the HAP contract, reduction or suspension of housing assistance payments and recovery of overpayments, where appropriate; and

(2) That if the Borrower fails to cure the default, HUD has the right to terminate the HAP contract or to take other corrective action.

(b) *Loan provisions.* Additional provisions governing default under the section 202 loan are included in the regulatory agreement and other loan documents described in § 885.415.

#### **§ 885.530 Notice upon HAP contract expiration.**

(a) *Notice required.* The HAP contract will provide that the Borrower will, at least one year before the end of the HAP contract term, notify each family leasing an assisted unit of any increase in the amount the family will be required to pay as rent as a result of the expiration.

(b) *Service requirements.* The notice under paragraph (a) of this section shall be accomplished by sending a letter by first class mail, properly stamped and addressed, to the family at its address at the project, with a proper return address; and serving a copy of the notice on any adult person answering the door at the leased dwelling unit, or if no adult responds, by placing the notice under or through the door, if possible, or else by affixing the notice to the door. Service shall not be considered to be effective until both required notices have been accomplished. The date on which the notice shall be considered to be received by the family shall be the date on which the Borrower mails the first class letter provided for in paragraph (b) of this section, or the date on which the notice provided for in paragraph (b) of this section is properly given, whichever is later.

(c) *Contents of notice.* The notice shall advise each affected family that, after the expiration date of the HAP contract, the family will be required to bear the entire cost of the rent and that the Borrower may, subject to requirements and restrictions contained in the regulatory agreement, the lease, and State or local law, change the rent. The notice also shall state:

(1) The actual (if known) or the estimated rent that will be charged following the expiration of the HAP contract;

(2) The difference between the new rent and the total tenant payment toward rent under the HAP contract; and



(3) The date the HAP contract will expire.

(d) *Certification to HUD.* The Borrower shall give HUD a certification that families have been notified in accordance with this section and shall attach to the certification an example of the text of the notice.

(e) *Applicability.* This section applies to all HAP contracts entered into under an agreement to enter into a housing assistance payments contract executed on or after October 1, 1981, or entered into under such an agreement executed before October 1, 1981 but renewed or amended after February 9, 1995.

(Approved by the Office of Management and Budget under control number 2502-0371).

#### **§ 885.535 HAP contract extension or renewal.**

Upon expiration of the term of the HAP contract, HUD and the Borrower may agree (subject to available funds) to extend the term of the HAP contract or to renew the HAP contract. The number of assisted units under the extended or renewed HAP contract shall equal the number of assisted units under the original HAP contract, except that—

(a) HUD and the Borrower may agree to reduce the number of assisted units by the number of assisted units that are not occupied by eligible families at the time of the extension or renewal; and

(b) HUD and the Borrower may agree to permit reductions in the number of assisted units during the term of the extended or renewed HAP contract as assisted units are vacated by eligible families. Nothing in this section shall prohibit HUD from reducing the number of units covered under the extended or renewed HAP contract in accordance with § 885.515(b).

#### **§ 885.600 Responsibilities of Borrower.**

(a) *Marketing.* (1) The Borrower must commence and continue diligent marketing activities not later than 90 days before the anticipated date of availability for occupancy of the first unit of the project. Market activities shall include the provision of notices of availability of housing under the program to operators of temporary housing for the homeless in the same housing market.

(2) Marketing must be done in accordance with the HUD-approved affirmative fair housing marketing plan and all Federal, State or local fair housing and equal opportunity requirements. The purpose of the plan and requirements is to achieve a condition in which eligible families of similar income levels in the same housing market have a like range of housing choices available to them

regardless of discriminatory considerations, such as their race, color, creed, religion, familial status, disability, sex or national origin. Marketing must also be done in accordance with the communication and notice requirements of Section 504 at 24 CFR 8.6 and 24 CFR 8.54, i.e., TDD requirements for all housing providers and methods to reach those with speech, visual and hearing impairments.

(3) At the time of HAP contract execution, the Borrower must submit to HUD a list of leased and unleased assisted units, with a justification for the unleased units, in order to qualify for vacancy payments for the unleased units.

(b) *Management and maintenance.* The Borrower is responsible for all management functions. These functions include selection and admission of tenants, required reexaminations of incomes for families occupying assisted units, collection of rents, termination of tenancy and eviction, and all repair and maintenance functions (including ordinary and extraordinary maintenance and replacement of capital items). All functions must be performed in compliance with equal opportunity requirements.

(c) *Contracting for services.* (1) With HUD approval, the Borrower may contract with a private or public entity for performance of the services or duties required in paragraphs (a) and (b) of this section. However, such an arrangement does not relieve the Borrower of responsibility for these services and duties. All such contracts are subject to the restrictions governing prohibited contractual relationships described in § 885.5. (These prohibitions do not extend to management contracts entered into by the Borrower with the sponsor or its non-profit affiliate).

(2) Consistent with the objectives of Executive Order 11625 (3 CFR, 1971-1975 Comp., p. 616, unless otherwise noted), Executive Order 12432 (3 CFR, 1983 Comp., p. 198, unless otherwise noted), and Executive Order 12138 (3 CFR, 1979 Comp., p. 393, unless otherwise noted), the Borrower will promote awareness and participation of minority and women's business enterprises in contracting and procurement activities.

(d) *Submission of financial and operating statements.* The Borrower must submit to HUD:

(1) Within 60 days after the end of each fiscal year of project operations, financial statements for the project audited by an independent public accountant and in the form required by HUD; and

(2) Other statements regarding project operation, financial conditions and occupancy as HUD may require to administer the HAP contract and to monitor project operations.

(e) *Use of project funds.* The Borrower shall maintain a separate project fund account in a depository or depositories which are members of the Federal Deposit Insurance Corporation or National Credit Union Share Insurance Fund and shall deposit all rents, charges, income and revenues arising from project operation or ownership to this account. All project funds are to be deposited in Federally-insured accounts. All balances shall be fully insured at all times, to the maximum extent possible. Project funds must be used for the operation of the project (including required insurance coverage), to make required principal and interest payments on the section 202 loan, and to make required deposits to the replacement reserve under § 885.605, in accordance with a HUD-approved budget. Any project funds in the project funds account (including earned interest) following the expiration of the fiscal year shall be deposited in a Federally-insured residual receipts account within 60 days following the end of the fiscal year. Withdrawals from this account may be made only for project purposes and with the approval of HUD. If there are funds remaining in the residual receipts account when the mortgage is satisfied, such funds shall be returned to HUD.

(f) *Reports.* The Borrower shall submit such reports as HUD may prescribe to demonstrate compliance with applicable civil rights and equal opportunity requirements.

(Approved by the Office of Management and Budget under control number 2502-0371).

#### **§ 885.605 Replacement reserve.**

(a) *Establishment of reserve.* The Borrower shall establish and maintain a replacement reserve to aid in funding extraordinary maintenance, and repair and replacement of capital items.

(b) *Deposits to reserve.* The Borrower shall make monthly deposits to the replacement reserve in an amount determined by HUD.

(c) *Level of reserve.* The reserve must be built up to and maintained at a level determined by HUD to be sufficient to meet projected requirements. Should the reserve reach that level, the amount of the deposit to the reserve may be reduced with the approval of HUD.

(d) *Administration of reserve.*

Replacement reserve funds must be deposited with HUD or in a Federally-insured depository in an interest-bearing account (s) whose balances are



fully insured at all times. All earnings including interest on the reserve must be added to the reserve. Funds may be drawn from the reserve and used only in accordance with HUD guidelines and with the approval of, or as directed by, HUD.

**§ 885.610 Selection and admission of tenants.**

(a) *Written tenant selection procedures.* The Owner shall adopt written tenant selection procedures which ensure nondiscrimination in the selection of tenants and that are consistent with the purpose of improving housing opportunities for very low-income elderly or handicapped persons; and reasonably related to program eligibility and an applicant's ability to perform the obligations of the lease. The Owner must comply with the following nondiscrimination authorities: section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and the implementing regulations at 24 CFR part 8; the Fair Housing Act (42 U.S.C. 3600–3619) and the implementing regulations at 24 CFR parts 100, 108, 109, and 110; Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and the implementing regulations at 24 CFR part 1; section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) and the implementing regulations at 24 CFR part 135; the Age Discrimination Act of 1975 (42 U.S.C. 6101–6107) and the implementing regulations at 24 CFR part 146; Executive Order 11246 (as amended), 3 CFR, 1964–1965 Comp., p. 339, and the implementing regulations at 41 CFR Chapter 60; Executive Order 11063 (Equal Opportunity in Housing), 3 CFR, 1959–1963 Comp., p. 652 and the implementing regulations at 24 CFR part 107; the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*) to the extent applicable; and other applicable Federal, State and local laws prohibiting discrimination and promoting equal opportunity. While local residency requirements are prohibited, local residency preferences may be applied in selecting tenants only to the extent that they are not inconsistent with affirmative fair housing marketing objectives and the Owner's HUD-approved affirmative fair housing marketing plan. Preferences may not be based on the length of time the applicant has resided in the jurisdiction. With respect to any residency preference, persons expected to reside in the community as a result of current or planned employment will be treated as residents. Owners shall promptly notify in writing any rejected applicant of the grounds for any

rejection. Additionally, owners shall maintain a written, chronological waiting list showing the name, race, gender, ethnicity and date of each person applying for the program.

(b) *Application for admission.* The Borrower must accept applications for admission to the project in the form prescribed by HUD and is obligated to confirm all information provided by the applicant families on the application. Applicant families must be requested to complete a release of information consent for verification of information. Applicants applying for assisted units must complete a certification of eligibility as part of the application for admission. Applicant families must meet the disclosure and verification requirements for Social Security Numbers, as provided by 24 CFR part 750. Applicant families must sign and submit consent forms for the obtaining of wage and claim information from State Wage Information Collection Agencies, as provided by 24 CFR part 760. Both the Borrower and the applicant must complete and sign the application for admission. On request, the Borrower must furnish copies of all applications for admission to HUD.

(c) *Determination of eligibility and selection of tenants.* The Borrower is responsible for determining whether applicants are eligible for admission and for the selection of families. To be eligible for admission, an applicant must be an elderly or handicapped family as defined in § 885.5, must meet any project occupancy requirements approved by HUD under § 885.225(a)(1), must meet the disclosure and verification requirements for Social Security Numbers, as provided by 24 CFR part 750), must sign and submit consent forms for obtaining of wage and claim information from State Wage Information Collection Agencies, as provided by 24 CFR part 760, and must, if applying for an assisted unit, be eligible for admission under part 813 of this chapter.

(d) *Unit assignment.* If the Borrower determines that the family is eligible and is otherwise acceptable and units are available, the Borrower will assign the family a unit. The Borrower will assign the family a unit of the appropriate size in accordance with HUD's general occupancy guidelines. If no suitable unit is available, the Borrower will place the family on a waiting list for the project and notify the family of when a suitable unit may become available. If the waiting list is so long that the applicant would not be likely to be admitted for the next 12 months, the Borrower may advise the applicant that no additional

applications for admission are being considered for that reason, except that the Borrower may not refuse to place an applicant on the waiting list if the applicant is otherwise eligible for assistance and claims that he or she qualifies for a Federal preference as provided in § 885.427.

(e) *Ineligibility determination.* If the Borrower determines that an applicant is ineligible for admission or the Borrower is not selecting the applicant for other reasons, the Borrower will promptly notify the applicant in writing of the determination, the reasons for the determination, and that the applicant has a right to request a meeting with the Borrower or managing agent to review the rejection, in accordance with HUD requirements. The review, if requested, may not be conducted by a member of the Borrower's staff who made the initial decision to reject the applicant. The applicant may also exercise other rights (e.g., rights granted under Federal, State or local civil rights laws) if the applicant believes he or she is being discriminated against on a prohibited basis. The informal review provisions for the denial of a Federal preference are provided at § 880.613(h) of this chapter.

(f) *Records.* Records on applicants and approved eligible families, which provide racial, ethnic, gender, handicap status, and place of previous residency data required by HUD, must be retained for three years.

(g) *Reexamination of family income and composition—(1) Regular reexaminations.* The Borrower must reexamine the income and composition of the family at least every 12 months. Upon verification of the information, the Borrower shall make appropriate adjustments in the total tenant payment in accordance with part 813 of this chapter and determine whether the family's unit size is still appropriate. The Borrower must adjust tenant rent and the housing assistance payment and must carry out any unit transfer in accordance with the administrative instructions issued by HUD. At the time of reexamination under paragraph (g)(1) of this section, the Borrower must require the family to meet the disclosure and verification requirements for Social Security Numbers, as provided by 24 CFR part 750. For requirements regarding the signing and submitting of consent forms by families for obtaining of wage and claim information from State Wage Information Collection Agencies, see 24 CFR part 760.

(2) *Interim reexaminations.* The family must comply with the provisions in its lease regarding interim reporting of changes in income. If the Borrower receives information concerning a

change in the family's income or other circumstances between regularly scheduled reexaminations, the Borrower must consult with the family and make any adjustments determined to be appropriate. See 24 CFR 750.10(d)(2)(i) for the requirements for the disclosure and verification of Social Security Numbers at interim reexaminations involving new family members. For requirements regarding the signing and submitting of consent forms by families for the obtaining of wage and claim information from State wage information collection agencies, see 24 CFR part 760. Any change in the family's income or other circumstances that results in an adjustment in the total tenant payment, tenant rent and housing assistance payment must be verified.

(3) *Continuation of housing assistance payments.* (i) A family shall remain eligible for housing assistance payments until the total tenant payment equals or exceeds the gross rent. The termination of subsidy eligibility will not affect the family's other rights under its lease. Housing assistance payments may be resumed if, as a result of changes in income, rent or other relevant circumstances during the term of the HAP contract, the family meets the income eligibility requirements of part 813 of this chapter and housing assistance is available for the unit under the terms of the HAP contract. The family will not be required to establish its eligibility for admission to the project under the remaining requirements of paragraph (c) of this section.

(ii) A family's eligibility for housing assistance payments may be terminated in accordance with HUD requirements for such reasons as failure to submit requested verification information, including information related to disclosure and verification of Social Security Numbers (as provided by 24 CFR part 750) or failure to sign and submit consent forms for the obtaining of wage and claim information from State wage information collection agencies (as provided by 24 CFR part 760).

(Approved by the Office of Management and Budget under control number 2502-0371).

#### **§ 885.615 Obligations of the family.**

(a) *Requirements.* The family shall:

(1) Pay amounts due under the lease directly to the Borrower.

(2) Supply such certification, release of information, consent, complete forms or documentation as the Borrower or HUD determines necessary, including information and documentation relating to the disclosure and verification of Social Security Numbers, as provided

by 24 CFR part 750, and the signing and submission of consent forms for the obtaining of wage and claim information from State Wage Information Collection Agencies, as provided by 24 CFR part 760;

(3) Allow the Borrower to inspect the dwelling unit at reasonable times and after reasonable notice;

(4) Notify the Borrower before vacating the dwelling unit; and

(5) Use the dwelling unit solely for residence by the family, and as the family's principal place of residence.

(b) *Prohibitions.* The family shall not:

(1) Assign the lease or transfer the unit; or

(2) Occupy, or receive assistance for the occupancy of, a unit governed under this part while occupying, or receiving assistance for occupancy of, another unit assisted under any Federal housing assistance program, including any section 8 program.

(Approved by the Office of Management and Budget under control number 2502-0371).

#### **§ 885.620 Overcrowded and underoccupied units.**

If the Borrower determines that because of change in family size, a unit is smaller than appropriate for the eligible family to which it is leased, or that the unit is larger than appropriate, housing assistance payments with respect to the unit will not be reduced or terminated until the eligible family has been relocated to an appropriate alternate unit. If possible, the Borrower will, as promptly as possible, offer the family an appropriate alternate unit. The Borrower may receive vacancy payments for the vacated unit if the Borrower complies with the requirements of § 885.650.

#### **§ 885.625 Lease requirements.**

(a) *Term of lease.* The term of the lease may not be less than one year. Unless the lease has been terminated by appropriate action, upon expiration of the lease term, the family and Borrower may execute a new lease for a term not less than one year, or may take no action. If no action is taken, the lease will automatically be renewed for successive terms of one month.

(b) *Termination by the family.* All leases may contain a provision that permits the family to terminate the lease upon 30 days advance notice. A lease for a term that exceeds one year must contain such provision.

(c) *Form.* The Borrower shall use the lease form prescribed by HUD. In addition to required provisions in the lease form, the Borrower may include a provision in the lease permitting the Borrower to enter the leased premises,

at any time, without advance notice where there is reasonable cause to believe that an emergency exists or that health or safety of a family member is endangered.

#### **§ 885.630 Termination of tenancy and modification of lease.**

The provisions of part 247 of this title apply to all decisions by a Borrower to terminate the tenancy or modify the lease of a family residing in a unit.

#### **§ 885.635 Security deposits.**

(a) *Collection of security deposit.* At the time of the initial execution of the lease, the Borrower:

(1) Will require each family occupying a unit to pay a security deposit in an amount equal to one month's total tenant payment or \$50, whichever is greater; and

(2) May require each family occupying an unassisted unit to pay a security deposit equal to one month's rent payable by the family. The family is expected to pay the security deposit from its own resources and other available public or private resources. The Borrower may collect the security deposit on an installment basis.

(b) *Security deposit provisions applicable to assisted and unassisted units.*—(1) *Administration of security deposit.* The Borrower must place the security deposits in a segregated interest-bearing account. The Borrower shall maintain a record of the amount in this account that is attributable to each family in residence in the project. Annually for all families, and when computing the amount available for disbursement under paragraph (b)(3) of this section, the Borrower shall allocate to the family's balance, the interest accrued on the balance during the year. Unless prohibited by State or local law, the Borrower may deduct for the family, from the accrued interest for the year, the administrative cost of computing the allocation to the family's balance. The amount of the administrative cost adjustment shall not exceed the accrued interest allocated to the family's balance for the year. The amount of the segregated, interest-bearing account maintained by the Borrower must at all times equal the total amount collected from the families then in occupancy plus any accrued interest and less allowable administrative cost adjustments. The Borrower must comply with any applicable State and local laws concerning interest payments on security deposits.

(2) *Family notification requirement.* In order to be considered for the refund of the security deposit, a family must

provide the Borrower with a forwarding address or arrange to pick up the refund.

(3) *Use of security deposit.* The Borrower, subject to State and local law and the requirements of paragraph (b)(3) of this section, may use the family's security deposit balance as reimbursement for any unpaid family contribution or other amount which the family owes under the lease. Within 30 days (or shorter time if required by State or local law) after receiving notification under paragraph (b)(2) of this section the Borrower must:

(i) Refund to a family which does not owe any amount under the lease the full amount of the family's security deposit balance;

(ii) Provide to a family owing under the lease a list itemizing each amount, along with a statement of the family's rights under State and local law. If the amount which the Borrower claims is owed by the family is less than the amount of the family's security deposit balance, the Borrower must refund the excess balance to the family. If the Borrower fails to provide the list, the family will be entitled to the refund of the full amount of the family's security deposit balance.

(4) *Disagreements.* If a disagreement arises concerning reimbursement of the security deposit, the family will have the right to present objections to the Borrower in an informal meeting. The Borrower must keep a record of any disagreements and meetings in a tenant file for inspection by HUD. The procedures of paragraph (b)(4) of this section do not preclude the family from exercising its rights under State or local law.

(5) *Decedent's interest in security deposit.* Upon the death of a member of a family, the decedent's interest, if any, in the security deposit will be governed by State or local law.

(c) *Reimbursement by HUD for assisted units.* If the family's security deposit balance is insufficient to reimburse the Borrower for any unpaid amount which the family owes under the lease for an assisted unit and the Borrower has provided the family with the list required by paragraph (b)(3)(ii) of this section, the Borrower may claim reimbursement from HUD for an amount not to exceed the lesser of:

(1) The amount owed the Borrower; or  
(2) One month's contract rent, minus the amount of the family's security deposit balance. Any reimbursement under this section will be applied first toward any unpaid tenant rent due under the lease. No reimbursement may be claimed for unpaid rent for the period after termination of the tenancy. The Borrower may be eligible for

vacancy payments following a vacancy in accordance with the requirements of § 885.650.

(Approved by the Office of Management and Budget under control number 2502-0371).

#### § 885.640 Adjustment of rents.

(a) *Contract rents.*—(1) *Adjustment based on approved budget.* If the HAP contract provides, or has been amended to provide, that contract rents will be adjusted based upon a HUD-approved budget, HUD will calculate contract rent adjustments based on the sum of the project's operating costs and debt service (as calculated by HUD), with adjustments for vacancies, the project's non-rental income, and other factors that HUD deems appropriate. The calculation will be made on the basis of information provided by the Borrower on a form acceptable to the Secretary. The automatic adjustment factor described in part 888 of this chapter is not used to adjust contract rents under paragraph (a)(1) of this section, except to the extent that the amount of the replacement reserve deposit is adjusted under § 880.602 of this chapter.

(2) *Annual and special adjustments.* If the HAP contract provides that contract rents will be adjusted based on the application of an automatic adjustment factor and by special additional adjustments:

(i) Consistent with the HAP contract, contract rents may be adjusted in accordance with part 888 of this chapter;

(ii) Special additional adjustments will be granted, to the extent determined necessary by HUD, to reflect increases in the actual and necessary expenses of owning and maintaining the assisted units which have resulted from substantial general increases in real property taxes, assessments, utility rates or similar costs (i.e., assessments and utilities not covered by regulated rates), and which are not adequately compensated for by an annual adjustment. The Borrower must submit to HUD required supporting data, financial statements and certifications for the special additional adjustment.

(b) *Rent for unassisted units.* The rent payable by families occupying units that are not assisted under the HAP contract shall be equal to the contract rent computed under paragraph (a) of this section.

(Approved by the Office of Management and Budget under control number 2502-0371).

#### § 885.645 Adjustment of utility allowances.

In connection with adjustments of contract rents as provided in § 885.640(a), the Borrower must submit an analysis of any project's utility

allowances. Such data as changes in utility rates and other facts affecting utility consumption should be provided as part of this analysis to permit appropriate adjustments in the utility allowances for assisted units. In addition, when approval of a utility rate change would result in a cumulative increase of 10 percent or more in the most recently approved utility allowances, the Borrower must advise HUD and request approval of new utility allowances. Whenever a utility allowance for an assisted unit is adjusted, the Borrower will promptly notify affected families and make a corresponding adjustment of the tenant rent and the amount of the housing assistance payment.

(Approved by the Office of Management and Budget under control number 2502-0371).

#### § 885.650 Conditions for receipt of vacancy payments for assisted units.

(a) *General.* Vacancy payments under the HAP contract will not be made unless the conditions for receipt of these housing assistance payments set forth in this section are fulfilled.

(b) *Vacancies during rent-up.* For each unit that is not leased as of the effective date of the HAP contract, the Borrower is entitled to vacancy payments in the amount of 80 percent of the contract rent for the first 60 days of vacancy, if the Borrower:

(1) Conducted marketing in accordance with § 885.600(a) and otherwise complied with § 885.600;  
(2) Has taken and continues to take all feasible actions to fill the vacancy; and  
(3) Has not rejected any eligible applicant except for good cause acceptable to HUD.

(c) *Vacancies after rent-up.* If an eligible family vacates a unit, the Borrower is entitled to vacancy payments in the amount of 80 percent of the contract rent for the first 60 days of vacancy if the Borrower:

(1) Certifies that it did not cause the vacancy by violating the lease, the HAP contract, or any applicable law;  
(2) Notified HUD of the vacancy or prospective vacancy and the reasons for the vacancy immediately upon learning of the vacancy or prospective vacancy;  
(3) Has fulfilled and continues to fulfill the requirements specified in § 885.600(a) (2) and (3) and § 885.650(b) (2) and (3); and  
(4) For any vacancy resulting from the Borrower's eviction of an eligible family, certifies that it has complied with § 885.630.

(d) *Vacancies for longer than 60 days.* If a unit continues to be vacant after the 60-day period specified in paragraph (b) or (c) of this section, the Borrower may

apply to receive additional vacancy payments in an amount equal to the principal and interest payments required to amortize that portion of the debt service attributable to the vacant unit for up to 12 additional months for the unit if:

(1) The unit was in decent, safe and sanitary condition during the vacancy period for which payment is claimed;

(2) The Borrower has fulfilled and continues to fulfill the requirements specified in paragraph (b) or (c) of this section, as appropriate; and

(3) The Borrower has demonstrated to the satisfaction of HUD that:

(i) For the period of vacancy, the project is not providing the Borrower with revenues at least equal to project expenses (exclusive of depreciation) and the amount of payments requested is not more than the portion of the deficiency attributable to the vacant unit; and

(ii) The project can achieve financial soundness within a reasonable time.

(e) *Prohibition of double compensation for vacancies.* If the Borrower collects payments for vacancies from other sources (tenant

rent, security deposits, payments under § 885.635(c), or governmental payments under other programs), the Borrower shall not be entitled to collect vacancy payments to the extent these collections from other sources plus the vacancy payment exceed contract rent.

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**Nicolas P. Retsinas,**

*Assistant Secretary for Housing-Federal Housing Commissioner.*

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